No. 75-1685

Supreme Court, U. S.
FILED
JUL 30 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

IOANNIS GEORGIOS KOLIOS, A/K/A JOHN KOLIOS, A/K/A JOHN KOLIAS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. REMINGTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1685

IOANNIS GEORGIOS KOLIOS, A/K/A JOHN KOLIOS, A/K/A JOHN KOLIAS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 786. Neither the oral decision of the immigration judge (Pet. App. B) nor the decision of the Board of Immigration Appeals (Pet. App. C) is reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. The petition for a writ of certiorari was filed on May 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien whose state narcotics conviction has been set aside upon satisfactory fulfillment of the

conditions of his probation is deportable as an alien "who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * * ."

STATEMENT

Petitioner, a native and citizen of Greece, entered the United States on March 13, 1968, as a permanent resident alien (Pet. App. 46). On May 1, 1972, petitioner pleaded guilty in a Texas state court to selling marihuana in violation of Texas law (Pet. App. 47; R. 29).[1] He was sentenced to five years' imprisonment, but imposition of the sentence was suspended and petitioner was placed on supervised, adult probation (R. 29-30).

On May 22, 1973, the District Director of the Immigration and Naturalization Service ordered petitioner (R. 27) to show cause why he should not be deported pursuant to 8 U.S.C. 1251(a)(11), which provides for the deportation of any alien in the United States "who at any time has been convicted of a violation of * * * any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana * * * ."

At a hearing before an immigration judge, petitioner admitted that he was not a citizen or national of the United States and that he had been convicted of the sale of marihuana in violation of Texas law (R. 20-21).

---

[1]The one-paragraph indictment to which petitioner pleaded guilty charged that petitioner "did * * * unlawfully sell to PAT DOTSON a narcotic drug, to wit: Marihuana" (R. 28). The record does not indicate the amount of marihuana involved in the sale.

"R." refers to the certified administrative record filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

The immigration judge found petitioner deportable and ordered him deported to Greece (Pet. App. 43-45).

Petitioner appealed to the Board of Immigration Appeals. Before his appeal was decided, petitioner fulfilled the conditions of his Texas probation and, pursuant to state law,[2] the Texas court "set aside" petitioner's conviction and "dismissed" the indictment under which he had been convicted (R. 10).

The Board of Immigration Appeals dismissed the appeal. It concluded that petitioner's "conviction is final for purposes of deportation and that the order setting aside his conviction has not removed the basis for deportation under [8 U.S.C. 1251(a)(11)]" (Pet. App. 48).

On petition for review, the court of appeals affirmed, with one judge dissenting. The majority stated: "It seems highly unlikely to us that Congress, which has narrowly confined the scope of expungement of conviction in federal drug cases, would contemplate that state expungement statutes of general applicability could insulate

---

[2]Tex. Code Crim. Proc. Ann., Art. 42.12, §7 (1966), provides in pertinent part:

> Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court * * * shall discharge the defendant. * * * [S]uch court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

any narcotics offender from the sanction of deportation" (Pet. App. 39).[3]

ARGUMENT

Petitioner contends that the setting aside of his conviction by the Texas court vitiated the finality of the conviction and removed the basis for the order of deportation. But as one court observed in connection with the Texas expungement statute in issue here: "Rather than a statute that completely erases the conviction, we believe the provision in controversy is accurately characterized as one that rewards a convicted party for good behavior during probation by releasing him from certain penalties and disabilities otherwise imposed upon convicted persons by Texas law." *Gonzalez de Lara* v. *United States*, 439 F. 2d 1316, 1318 (C.A. 5). See also *Glenn* v. *State*, 442 S.W. 2d 360 (Tex. Ct. Crim. App.).

Since 1959 it has been the Attorney General's position that, under 8 U.S.C. 1251(a)(11), a state expungement of a narcotics conviction does not affect the validity of a deportation order based upon that conviction. In *Matter of A— F—*, 8 I&N Dec. 429, 445-446, the Attorney General stated:

> The history of [8 U.S.C. 1251] (a)(11) convinces me that Congress did not intend that aliens convicted of narcotic violations should escape deportation because * * * the State affords a procedure authorizing a technical erasure of the conviction. * * * I believe that Congress intended the inquiry to stop at the point

[3]On July 11, 1975, Rep. Paul Tsongas introduced a private bill (H.R. 8596, 94th Cong., 1st Sess.) to direct the Attorney General to cancel petitioner's deportation order. In accordance with Immigration and Naturalization Service policy, petitioner's deportation has been stayed administratively until February 1, 1977, or until adverse action is taken by Congress on the private bill.

> at which it is ascertained that there has been a conviction in the normal sense in which the term is used in Federal law. * * *
>
> * * * It is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions which * * * provide for the expungement of a record of conviction upon the termination of probation.

The Attorney General's interpretation of Congressional intent rested in part on a 1956 amendment to 8 U.S.C. 1251(b). That section exempts from deportation an alien who has been convicted of certain crimes if he has been pardoned or if the sentencing court recommends against deportation. The 1956 amendment made the Section 1251(b) exemption inapplicable to aliens convicted of narcotics or marihuana offenses.

The courts of appeals consistently have agreed with the Attorney General's interpretation of the Act and uniformly have rejected arguments similar to petitioner's.[4] Congress has not amended the statute to overturn these administrative and judicial interpretations.

[4]*E.g.*, *Gonzalez de Lara* v. *United States*, 439 F. 2d 1316, 1318-1319 (C.A. 5); *Aguilera-Enriquez* v. *Immigration and Naturalization Service*, 516 F. 2d 565, 570 (C.A. 6); *Will* v. *Immigration and Naturalization Service*, 447 F. 2d 529, 531 (C.A. 7); *Cruz-Martinez* v. *Immigration and Naturalization Service*, 404 F. 2d 1198, 1200 (C.A. 9), certiorari denied, 394 U.S. 955; *Brownrigg* v. *Immigration and Naturalization Service*, 356 F. 2d 877, 878 (C.A. 9); *Kelly* v. *Immigration and Naturalization Service*, 349 F. 2d 473, 474 (C.A. 9), certiorari denied, 382 U.S. 932; *Garcia-Gonzalez* v. *Immigration and Naturalization Service*, 344 F. 2d 804, 808 (C.A. 9), certiorari denied, 382 U.S. 840.

The wisdom of the policy underlying the Act's narcotics-related deportation provisions is not a matter for judicial inquiry. The court of appeals properly noted: "deportation is a matter of Congressional policy" (Pet. App. 36). If a particular application of the Act's deportation provisions leads to an apparently harsh result, that is no warrant to ignore the legislative will. As the court of appeals correctly stated, "relief in such cases * * * is properly a matter for the Congress" (Pet. App. 39).

Mestre Morera v. *Immigration and Naturalization Service*, 462 F. 2d 1030 (C.A. 1), on which petitioner relies, is inapposite. The court there held that "the Congressional policy of deportation for narcotics offenders conflicted with another Congressional policy of rehabilitation for young offenders whose convictions were erased under the Federal Youth Corrections Act" (Pet. App. 36-37). The court resolved the conflict in favor of the policy of youth rehabilitation, holding that the setting aside of a conviction under the Federal Youth Corrections Act—which, unlike the Texas statute at issue here (see *supra*, p. 3, n. 2), does "more to free the defendant from all taint of conviction than the mere restoration of his civil rights" (Pet. App. 37, n. 7)—operates to nullify a deportation order based on that conviction.[5]

There is no equivalent conflict of Congressional policy with respect to narcotics offenders who, like petitioner, are treated by the courts in all respects as adults. To extend the principles of *Mestre Morera* to all expungement

[5]In *Matter of Andrade*, Interim Decision 2276, decided April 5, 1974, the Board of Immigration Appeals extended the doctrine of *Mestre Morera* to expungements of minor marihuana convictions under state juvenile laws. As the court of appeals stated, "[t]his practice is consistent with the Congressional policy, at least as interpreted by *Mestre Morera*, that statutory schemes aiming at the rehabilitation of youthful offenders should be given full effect" (Pet. App. 37).

statutes would "go beyond the Congressional policy evidenced by its excepting narcotics offenses from the saving effects of a pardon or a judicial recommendation against deportation" (Pet. App. 38). Moreover, because of "the blanket nature of state expungement statutes" (*ibid.*), petitioner's theory would lead to results wholly at odds with the general legislative treatment of narcotics violators. As the court of appeals stated (Pet. App. 38-39):

> As is true of the [expungement] statute in this case, the narcotics offense could range from simple possession of marijuana to wholesale distribution of hard drugs. So long as the trial judge deems probation appropriate, expungement is a possibility. Yet Congress, when it has moved to ameliorate sanctions in a narcotics cases, has taken a selective approach. In its 1970 amendment to 21 U.S.C. §844, it provided for the possibility of expungement, but limited the possibility to cases of simple possession of a controlled substance, and provided more complete expungement for young offenders. * * * It seems highly unlikely to us that Congress, which has narrowly confined the scope of expungement of conviction in federal drug cases, would contemplate that state expungement statutes of general applicability could insulate any narcotics offender from the sanction of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. REMINGTON,
Attorneys.

JULY 1976.

DOJ-1976-07